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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

Michael F. Foy, IV, a single or married
person.

Plaintiff,

Vs.

Jennifer Vinson, a single or married
person, and Jane Does I-X, White
Partnerships I-X, and Black
Corporations I-X, AND Municipal
Entity I-X.

Defendants.

Case No.: 2:21-cv-02076-MTL

**RESPONSE TO:
MOTION TO DISMISS**

COMES NOW, Michael F. Foy (Plaintiff) by and through his undersigned
counsel, and for his, **RESPONSE TO: MOTION TO DISMISS**, states as follows:

Plaintiff states that Jennifer Vinson (Defendant) request, to this Court, that his
Complaint, filed in state court for defamation *per se*, should be dismissed because it does
not state a claim on which relief should be granted, in this Court, should be denied; as
same does state a claim for relief in accordance with rules of procedure in the court in

which said complaint was filed; additionally, it does state a claim for relief in accordance with rules of procedure in this Court. Moreover, Defendant's belief that Plaintiff's claim is barred by the statute of limitations is also in error based on being improperly pled, by a tolling statute, and the time period in which the publication took place, which Defendant, who took said actions of publication knows, or should have known, that her actions were within the statute of limitations and thus not time barred. All of which is more fully set forth in the proceeding Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

I.) PROCEDURAL HISTORY:

1.) On August 29, 2020, Plaintiff filed a Complaint against Defendant in The McDowell Mountain Justice Court, in and for, the County of Maricopa, alleging that Defendant had published an internet website that accused him of the rape of several women in the greater Phoenix area, including her; thereby defaming him. After said filing Plaintiff sought three (3) extensions of time to serve Defendant, with said Complaint (November 19, 2021, January 25, 2021, and March 16, 2021). All of said Motions were granted. Thereafter, on June 9, 2021, the suit was dismissed because Defendant could not obtain service of process on Defendant.

2.) On October 28, 2021, Plaintiff filed a Complaint against Defendant in The Superior Court of the State of Arizona in and for the State of Arizona, alleging that Defendant had published an internet website that accused him of the rape of several women in the greater Phoenix area, including her; thereby, defaming him that named the

1 website that contained said statements as <http://metroophoenix.org>. On November 7,
2 2021, Plaintiff served said Complaint on an individual who stated his name was “Ismael”
3 at a residential residence that is owned by Defendant in Maricopa County. On November
4 22, 2021, at 6:26 p.m., Defendant’s counsel sent an email to undersigned counsel
5 requesting an extension of time to file a response to the state court action, to December
6 16, 2021, which on November 23, 2021, at 9:29 a.m. via email undersigned counsel stated
7 he had no objection to same. Thereafter, Defendant filed, in the state court action, the
8 Pleading styled as, Unopposed Motion to Extend Time to Respond to Complaint, which
9 was granted.

10 3.) On December 7, 2021, Defendant filed in this Court the Pleading styled as, Notice
11 of Removal of Civil Action. Thereafter, on December 13, 2021, sent at 8:08 p.m.
12 Defendant via email sent to undersigned counsel a correspondence, a ‘meet and confer
13 letter’, pursuant to LRCiv. 12.1(c) requesting that Plaintiff voluntarily dismiss the instant
14 action that gave undersigned counsel until 4:00 p.m. the next day to respond to said ‘meet
15 and confer letter’. Essentially, liberally put, an eight (8) hour time period to respond, was
16 given by Defendant’s counsel. On December 14, 2021 at 6:35 p.m. undersigned counsel,
17 via email, sent Defendant’s counsel a correspondence in response to her ‘meet and confer
18 letter’ stating that he had just reviewed same and would never be able to make said
19 deadline and requested an extension to respond to same to December 17, 2021, on or
20 before 1:00 p.m. On December 14, 2021, at 6:47 p.m. Defendant filed her Motion to
21 Dismiss.

1 **II.) ARGUMENT AS TO FAILURE TO STATE A CLAIM:**

2 1.) Defendant is correct that Fed. R. Civ. P., Rule 8(a)(2) states that a Complaint must
3 contain “a short and plain statement of the claim showing that the pleader is entitled to
4 relief” as articulated in the case she cites *Bell Atlantic*, but same is a federal case being
5 applied to a state court filed Complaint. And Defendant thereafter cites numerous federal
6 cases that state what the contents of a Complaint should contain and that if same are not
7 contained in same, then the Complaint should be dismissed pursuant to Fed. R. Civ. P.,
8 Rule 12(b)(6); and then concludes that Defendant’s Complaint “falls woefully short of
9 these requirements”. Plaintiff does not agree with Defendant’s conclusion that his
10 Complaint should be dismissed pursuant to Fed. R. Civ. P., Rule 12(b)(6) as the
11 Complaint does state a claim on which relief should be based.
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17 2.) Plaintiff believes that his Complaint does state a claim on which relief should be
18 based for several reasons, they are:

19 a.) Plaintiff originally filed the instant action in state court; and
20 now Defendant requests that this Court apply federal rules of procedure to
21 same, Plaintiff believes that same in an unjust standard which this Court
22 should use in determining the sufficiency of the Complaint. That is,
23 Ariz.R.Civ.P., Rule 8(a)(2) is modeled after Fed. R. Civ. P., Rule 8(a)(2)
24 but the application of federal jurisprudence to establish the sufficiency of a
25 Defendant’s claim is unjust as the sufficiency of same should be
26 determined by Arizona jurisprudence, not federal. As it is stated in
27 *Gatecliff v. Great Republic Life Ins. Co.*, 154 Ariz. 502, 508, 744 P.2d 29,
28 35 (Ariz. App. 1987) “[w]hen a complaint is the target of a rule 12(b)(6)

1 motion, the court must assume the truth of all of the complaint's material
2 allegations, accord the plaintiffs the benefit of all inferences which the
3 complaint can reasonably support, and deny the motion unless certain that
4 plaintiffs can prove no set of facts which will entitle them to relief upon
5 their stated claims". Or as stated more recently in *Dube v. Likins*, 167 P.3d
6 93, 99, 216 Ariz. 406, 411 (Ariz. App. 2007). "Because Arizona is a notice
7 pleading state, a complaint need only have a statement of the ground upon
8 which the court's jurisdiction depends, a statement of the claim showing
9 that the pleader is entitled to relief, and a demand for judgment".

10 Defendant's Complaint, filed in state court establishes the Parties,
11 the state court's jurisdiction, and a short plain statement of facts that
12 establish that Defendant has created a certain website that states defamatory
13 statements against him and requests the court determine if Defendant's
14 statements are defamatory with a request for damages. Thus, this Court
15 should by said Arizona jurisprudence recognize that Arizona is a notice
16 pleading state, it must assume the truth of all of the Plaintiff's material
17 allegations made against Defendant in his Complaint, accord Plaintiff the
18 benefit of all inferences made against Defendant in his Complaint as they
19 are reasonably supported in the Complaint and find that there does exist in
20 the Complaint a certain set of facts that entitle the Plaintiff to the relief he
21 seeks in same.

22 Or *in the alternative* if this Court does not find that Defendant's
23 Complaint was written well enough to establish the tort of defamation then
24 Plaintiff seeks leave of this Court to amend his Complaint prior to dismissal
25 (plead in an accompanying motion). As by Arizona jurisprudence it is
26 stated in *Wigglesworth v. Mauldin*, 195 Ariz. 432, 438, 990 P.2d 26, 33
27 (Ariz. App. 1999) that "[b]efore the trial court grants a Rule 12(b)(6)
28 motion to dismiss, the non-moving party should be given an opportunity to
amend the complaint if such an amendment cures its defects".

1 Thusly, if this Court finds that Plaintiff's Complaint fails to state a
2 claim on which he is not entitled to relief because it is not plead or worded
3 correctly as averred by Defendant, Plaintiff seeks leave of this Court to
4 amend his Complaint before same is dismissed, pursuant to requirement as
5 stated in *Wigglesworth* and pursuant to Ariz.R.Civ.P., Rule 15(2) which
6 states "[l]eave to amend must be freely given when justice requires".

7
8 b.) Plaintiff requests that if this Court does not determine that
9 Defendant's request to be dismissed is not controlled by Arizona's rules of
10 procedure and that the federal rules of procedure should apply to its
11 dismissal, then by the federal rules of procedure his claim is still not subject
12 to dismissal. That is, Fed. R. Civ. P., Rule 8(a)(2) is worded exactly as
13 Ariz.R.Civ.P., Rule 8(a)(2) with nearly the same development of federal
14 jurisprudence as Arizona jurisprudence. As it is stated in *Conley v.*
15 *Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 101-02, 2 L.Ed.2d 80 (1957) in
16 analysis of a complaint being subject to dismissal pursuant to Fed. R. Civ.
17 P., Rule 12(b)(6) that it should not be dismissed "unless it appears beyond
18 doubt that the plaintiff can prove no set of facts in support of his claim
19 which would entitle him to relief." Moreover, it is stated in *Shah v. County*
20 *of Los Angeles*, 797 F.2d 743, 745 (9th Cir.1986); wherein, the district
21 court dismissed plaintiff's suit against defendant for failure to state a claim
22 that "[w]e review de novo a district court's dismissal of an action for failure
23 to state a claim. ... In conducting this review, we must assume the
24 correctness of all the factual allegations made by Shah, the party whose suit
25 the district court dismissed".

26 Therefore, as previously stated Plaintiff's Complaint, filed in state
27 court, establishes the Parties, a short plain statement of facts that establish
28 that Defendant has created a certain website that states defamatory
statements against him and requests the court determine if Defendant's

1 statements are defamatory with a request for damages. Thus, this Court
2 should find that by said line of federal jurisprudence the Federal Rules of
3 Civil Procedure are also require notice pleading, and it must assume the
4 truth of all of the Plaintiff's material allegations made against Defendant in
5 his Complaint. To the conclusion, that Plaintiff's Complaint is reasonably
6 supported by a certain set of facts made in a short plain statement that
7 entitles the Plaintiff to the relief he seeks in same.

8 Or *in the alternative* if this Court does not find that Defendant's
9 Complaint was written well enough to establish the tort of defamation then
10 Plaintiff seeks leave of this Court to amend his Complaint prior to
11 dismissal. As it is stated in *Balistreri v. Pacifica Police Dept.*, 901 F.2d
12 696, 701 (9th Cir. 1990) Fed.R.Civ.P. 15(a), Defendants "request to amend
13 her complaint invokes Fed.R.Civ.P. 15(a), which requires that even where
14 amendment is not a matter of right, leave to amend shall "be freely granted
15 when justice so requires." Under well established Ninth circuit precedent
16 construing Rule 15(a), the court abused its discretion in not granting her
17 {defendant} leave to amend.

18
19 c.) Defendant states in her Motion to Dismiss that Plaintiff cannot cure
20 the alleged defects in his Complaint because the adding of additional facts
21 would only be in a "conclusory fashion" which Defendant avers is what is
22 plead in every complaint -conclusory facts- that establish -conclusory
23 claims- until subsequent discovery or trial on one's stated facts and claims
24 prove so, or otherwise. What Defendant wants is trial based on her set of
25 facts not Plaintiffs, which by either Fed. R. Civ. P., Rule 12(b)(6) or
26 Ariz.R.Civ.P., Rule 12(b)(6) is not the standard, as stated above. As by the
27 federal or state rules of procedure it does not require that every fact that is
28 alleged in a complaint and every claim that is alleged in a complaint be

1 support by an attached exhibit, affidavit, statute, or jurisprudence that
2 establishes that a certain claim exists in a particular jurisdiction. Because
3 even then the exhibit, affidavit, statute, or jurisprudence that establishes a
4 certain claim is subject to each parties' ability to address same through the
5 discovery process, which may then establish the validity of same or the
6 validity of same may only be established by the trier of fact. Such a request
7 that Defendant makes of this Court would change the federal and state
8 system of pleading into code pleading system of procedure, as opposed to
9 its underlying principle of being a notice pleading system of procedure.

10 Additionally, Defendant states that Plaintiff cannot prove the
11 statements made by Defendant are false, without running afoul of
12 Fed.R.Civ.P. 11, conversely Defendant cannot prove from the Complaint or
13 her Motion to Dismiss that the statements are true without running afoul of
14 Fed.R.Civ.P. 11, as Plaintiff has stated to his counsel that the statements
15 made by Defendant are false; as, it is believed, Defendant has stated to her
16 counsel that the statements are true, both are equally conclusory until
17 discovery in the instant action has taken place. Moreover, what will be
18 stated in more detail in the proceeding section as it applies to Defendant's
19 statute of limitations agreement is all of the documentary evidence Plaintiff
20 has that does prove Defendant's identity and does establish that the
21 statements made in Defendant's said website are false and thus defamatory.

22 **II.) ARGUMENT AS TO STATUE OF LIMITATIONS:**

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24 1.) Defendant in her Motion to Dismiss requests that this Court dismiss Plaintiff's
25 Complaint, pursuant to Fed. R. Civ. P., Rule 12(b)(6), because it runs afoul of the
26 Arizona's statute of limitations to Plaintiff's claim of defamation -a defense- which
27 Plaintiff avers is the incorrect rule of procedure on which a request to dismiss his
28

1 Complaint should be based. That is, Fed. R. Civ. P., Rule 12(b)(6) specifically states
2 what claims are stated in said rule with none of them being that a complaint may be
3 dismissed based on the defense of the statute of limitations said Rule is inapplicable to
4 Defendant's Motion to Dismiss. As the defense of a statute of limitations is clearly stated
5 in Fed. R. Civ. P., Rule 8 (c); wherein, it is states:
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8 **(c) Affirmative Defenses.**

9 (1) In General. In responding to a pleading, a party must affirmatively state
10 any avoidance or affirmative defense, including:

- 11 • accord and satisfaction;
- 12 • arbitration and award;
- 13 • assumption of risk;
- 14 • contributory negligence;
- 15 • duress;
- 16 • estoppel;
- 17 • failure of consideration;
- 18 • fraud;
- 19 • illegality;
- 20 • injury by fellow servant;
- 21 • laches;
- 22 • license;
- 23 • payment;
- 24 • release;
- 25 • res judicata;
- 26 • statute of frauds;
- 27 • **statute of limitations**; and
- 28 • waiver

(Emphasis added)

Therefore, as Defendant has requested that Plaintiff's Complaint be dismissed
pursuant to Fed. R. Civ. P., Rule 12(b)(6) and as said rule does not allow a defense to be
brought by said Rule Defendant's request should be denied based on her failure to plead
the request by the proper rule of procedure.

2.) Or in the *alternative* if this Court does not dismiss Defendant's Motion to Dismiss for failure to plead her request for relief by the correct rule of procedure, Plaintiff seeks that this Court deny Defendant's Motion to Dismiss by law as her action of leaving the state caused the statute of limitations to be tolled. That is, Arizona Revised Statutes (A.R.S.) §12-501 is a statute that tolls the statute of limitations when a defendant removes themselves from the State of Arizona, as the statute states:

When a person against whom there is a cause of action is without the state at the time the cause of action accrues or at any time during which the action might have been maintained, such action may be brought against the person after his return to the state. The time of such person's absence shall not be counted or taken as a part of the time limited by the provisions of this chapter.

Said statute application was addressed in *Peters v. M & O Const., Inc.*, 579 P.2d 72, 75, 119 Ariz. 34, 37 (Ariz. App. 1978); wherein, the court stated the following:

We reject this contention and hold that the filing of the original complaint did not toll the statute of limitations. If a complaint is dismissed without prejudice, the general rule is that the situation is the same as if the suit had never been brought, unless there is a statute to the contrary. ... The legislature has provided conditions which do toll the statute but defective service is not such a condition. See ARS §§ 12-501, 12-502 and 12-507.

Applying *Peters* to the instant action, in recap, Plaintiff filed suit in Arizona Justice Court on August 21, 2020, the matter was continued three (3) times because Plaintiff was not able to obtain service on Defendant; and then dismissed on June 9, 2021, based on lack of service. On October 28, 2021, Plaintiff filed the instant action in Arizona Superior Court on October 28, 2021, which Defendant sought removal of to this Court on December 7, 2021. Hence, in Defendant's Pleading styled as, Notice of

1 Removal of Civil Action, affixed to said Pleading as Exhibit B is a, Declaration of
2 Jennifer Vinson in Support of Notice of Removal; wherein; Defendant (Ms. Vinson)
3 states at paragraph three (3) “[i]n March of 2021, I moved to Seattle for work. I have
4 been a resident of Seattle since that time” signed under the penalty of perjury. Defendant
5 incorporates and merges said Pleading into this Pleading by this reference to it.
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8 Therefore, based on A.R.S. §12-501 Plaintiff’s claim filed on August 21, 2020,
9 dismissed after Defendant moved out of the State of Arizona was tolled when Defendant
10 removed herself from the State of Arizona in March of 2021. Thus, Plaintiff’s Complaint
11 is not barred by Arizona’s statute of limitations because of the tolling of his claim
12 pursuant to said statute.
13

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15 3.) Or in the *alternative* if this Court does not dismiss Defendant’s Motion to Dismiss
16 for failure to plead her requested relief by the correct rule of procedure or pursuant to
17 A.R.S. §12-501 that tolls the statute of limitations when a defendant removes themselves
18 from the State of Arizona, then this Court should deny Defendant’s Motion to Dismiss
19 based on her republishing of her defamatory statement in four (4) different internet or
20 social media venues, that included revisions to her original publishing, inclusive of her
21 starting an online petition that sought that to enlist the members from said new venues
22 when Defendant stated “Sign this petition to let news organizations, the Glendale P.D.
23 and our justice system know we want this to stop. Let them know we are a strong, we
24 want actual justice for actual community members and we want our streets safe”.
25
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28 That is, Defendant did state Arizona jurisprudence correctly when she cited the

1 general rule as exposed in *Larue* that states:

2 Under this rule, a cause of action for defamation arises at the time
3 the statement is first published; later circulation of the original publication
4 does not start the statute of limitations anew, nor does it give rise to a new
5 cause of action.

6 But Defendant fails to state in her Motion to Dismiss the various exceptions to this
7 rule, as to when republication of the original statement gives rise to a second cause
8 of action; thereby, creating a new statute of limitations, as *Larue* also stated:

9 This appeal raises two issues of first impression in Arizona
10 regarding the accrual date of a cause of action for defamation: (1) whether
11 the single publication rule applies to defamatory statements published on
12 the Internet, and (2) what constitutes a republication of a statement posted
13 on the Internet.

14 . . .

15 Generally, republishing material in a new edition, editing and
16 republishing it, or placing it in a new form is a separate publication giving
17 rise to a separate cause of action.

18 . . .

19 A plaintiff has a new cause of action when “the defendant edits and
20 retransmits the defamatory material, or distributes the defamatory material
21 for a second time with the goal of reaching a new audience”.

22 (Supra, 445 & 446)

23
24 All of which Plaintiff will prove, as he has documentary evidence that establish
25 some time in February 2021, that Defendant edited her websites the bears the URL of
26 <https://metoophoenix.com/> to add a link to it to an Instagram® account and a Twitter®
27 account that also contains editing from the original post. Moreover, in March of 2021,
28

1 Defendant changed the URL of <https://metoophoenix.com/> to <https://metoophoenix.org/>.
2
3 Then on August 25, 2021, a petition was created on a Change.org website that was then
4 shared through a link to her 'Metoophoenix' Twitter account; wherein, the above stated
5 quote was made in addition to several additional edits that stated more defamatory
6 language about Plaintiff to said Change.org website, as they are false, all of which
7
8 Plaintiff has documentary evidence of¹. But, as argued above Plaintiff cannot attach all
9 of this evidence to his Complaint, nor to this response as pursuant to Fed. R. Civ. P., Rule
10 12(d) or Ariz.R.Civ.P., Rule 12(d) it would make Defendant's Motion to Dismiss a
11 Motion, a motion for summary judgment.

12
13 Therefore, it is Plaintiff's position that although in *Larue* it was stated that Arizona
14 has a what the Court refers to as a 'single publication rule' Defendant's edits and changes
15 of her original website to four different four (4) different internet or social media venues
16 constitutes republication of her original statements made to her <https://metoophoenix.com/>
17 website as Plaintiff avers they are false and defamatory and thus defeats Defendant's
18 claim that his Complaint is barred by said statute of limitations. In addition to a forty-four
19 (44) page report from a private investigator that explains how Defendant sought to
20 disguise her identity through the various websites or social media platforms.
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25 **WHEREFORE**, Plaintiff, for the above stated reasons, avers that his Complaint
26 that was filed on October 28, 2021, does state a claim on which relief should be based
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¹ Additionally, on December 21, 2021, at 9:52 a.m. via email Plaintiff's counsel sent all of the above stated documentary evidence and additional documentary evidence to Defendant's counsel, who has yet to respond to same.

1 and is not barred by the statute of limitations, as alleged in Defendant's Motion to
2 Dismiss, and as such Defendant's Motion to Dismiss said should be denied, as from all of
3 the above stated there does exist a substantial factual basis to Plaintiff's claim that should
4 proceed to Defendant answering said Complaint and the discovery process, so Plaintiff
5 may formally produce and obtain additional evidence that Defendant's statements made
6 on the various stated websites or social media platforms are false and of a defamatory *per*
7
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9 *se*.

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12 **RESPECTFULLY SUBMITTED** this 27th day of December, 2021.
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15
16 By: /s/ Joel L. Brand, Esq.

17 Joel L. Brand, Esq.

18 **THE LAW OFFICE OF JOEL L. BRAND**

19 **Attorney for Plaintiff**
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CERTIFICATE OF SERVICE

I hereby certify that on December 27th, 2021, a true and correct copy of the foregoing document was filed electronically with the Court. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt, including:

Stacy F. Gottlieb, Esq.
Lori V. Berke, Esq.
BERKE LAW FIRM, PLLC
1601 N. 7th Street, Suite 360
Phoenix, AZ 85006
Attorneys for Defendant Jennifer Vinson

By: /s/ Carriena J. Schulder
Carriena J. Schulder